

APPEAL NO. 220173
FILED MARCH 23, 2022

This appeal arises pursuant to the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 14, 2021, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to right shoulder impingement syndrome or a right shoulder rotator cuff tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on June 21, 2021; and (3) the claimant's impairment rating (IR) is 10%. The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), which extends to at least a contusion to the right shoulder, contusion to the right hip, contusion to the right thigh, and contusion to the right knee. The claimant was injured on (date of injury), when she tripped over bolts sticking out of the ground and fell onto her right side.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.—Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to right shoulder impingement syndrome or a right shoulder rotator cuff tear is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on June 21, 2021, is supported by sufficient evidence and is affirmed.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 Tex. Admin. Code § 130.1(c)(3) (Rule 130.1(c)(3)) provides, in part, that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The ALJ determined that the claimant's IR is 10% as certified by (Dr. M), a designated doctor appointed by the Division. Dr. M examined the claimant on August 5, 2021, and issued alternate certifications on September 7, 2021. In the first certification Dr. M opined the claimant had not reached MMI considering both the accepted conditions and the disputed conditions of right shoulder impingement syndrome and a right shoulder rotator cuff tear. We have affirmed the ALJ's determination that the compensable injury does not extend to right shoulder impingement syndrome or a right shoulder rotator cuff tear; therefore, this certification is not adoptable.

In his alternate certification Dr. M considered a contusion to the right shoulder, contusion to the right hip, contusion to the right thigh, and contusion to the right knee, which is the compensable injury in this case at this time. Dr. M opined the claimant reached MMI on June 21, 2021, and, using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), assigned a 10% IR. Based on range of motion (ROM) measurements taken during the examination, Dr. M assigned 4% impairment for the claimant's right knee, 0% impairment for the claimant's right hip, and 10% upper extremity (UE) impairment for the claimant's right shoulder. Dr. M converted 10% UE impairment to 6% whole person impairment (WPI), and then combined 4% impairment with 6% impairment for a total WPI of 10%. Dr. M's narrative report reflects the 4% impairment for the claimant's right knee was made in accordance with the AMA Guides. However, Dr. M's 10% IR contains errors.

In his narrative report Dr. M noted the following ROM right hip measurements and resulting impairments using Table 40 on page 3/78 of the AMA Guides: 94/96° of flexion for 0% impairment (we note Dr. M incorrectly identified these impairments as UE impairments); 4/4° of extension for 0% impairment; 26/26° of abduction for 0%

impairment; 10/10° of adduction for 0% impairment; 21/21° of internal rotation for 0% impairment; and 31/31° of external rotation for 0% impairment. However, Table 40 on page 3/78 provides that less than 100° of hip flexion results in 2% impairment, not 0% as assigned by Dr. M, and 10/10° of adduction results in 2% impairment, not 0% as assigned by Dr. M.

In Section 3.2e, titled “[ROM],” page 3/77, the AMA Guides provides in part that “[e]valuating permanent impairment of the lower extremity according to its [ROM] is a suitable method.” Section 3.2e does not require that a certifying doctor must only use the most severe impairment for an individual direction of motion within the same table [Tables 40 through 43]. See Appeals Panel Decision (APD) 110741, decided July 25, 2011.

The Appeals Panel has held there is no specific provision in the AMA Guides in the Lower Extremity section that requires ROM deficits be utilized to increase the impairment for a single joint, and it is within the certifying doctor’s discretion as a matter of medical judgment to use or not use the different angles of loss of ROM in a single joint. See APD 132734, decided January 9, 2014. Dr. M did not accurately reflect the impairment assessed for the right hip flexion and adduction ROMs he measured, and because of this error it cannot be determined whether Dr. M would have used both planes of ROM deficits for the claimant’s right hip or only one plane of ROM deficits. Accordingly, we reverse the ALJ’s determination that the claimant’s IR is 10%, and we remand the IR issue to the ALJ for further action consistent with this decision.

We also note Dr. M’s IR contains other errors. In his narrative report Dr. M noted the following right shoulder ROM measurements and resulting impairments using Figures 38, 41, and 44 on pages 3/43 through 3/45 of the AMA Guides: 140° of right shoulder flexion for 4% UE impairment; 30° of right shoulder extension for 1% UE impairment; 90° of abduction for 2% UE impairment; 20° of adduction for 1% UE impairment; 60° of internal rotation for 2% UE impairment; and 60° of external rotation for 0% UE impairment. Dr. M added these impairments (4+1+2+1+2+0) for 10% UE impairment, and, using Table 3 on page 3/20 of the AMA Guides, Dr. M converted 10% UE impairment to 6% WPI. However, Figure 38 on page 3/43 provides that 140° of flexion results in 3% UE impairment, not 4% as assigned by Dr. M. Additionally, Figure 41 on page 3/44 provides that 90° of abduction results in 4% UE impairment, not 2% as assigned by Dr. M. Adding the correct UE impairments for these ROM measurements (3+1+4+1+2+0) results in 11% UE impairment, not 10% as assigned by Dr. M. Using Table 3 on page 3/20, 11% UE impairment converts to 7% WPI, not 6% WPI as assigned by Dr. M.

We have affirmed the ALJ's determination that the claimant reached MMI on June 21, 2021, and there is no other certification in evidence that certifies the claimant reached MMI on that date. Accordingly, we remand the IR issue to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to right shoulder impingement syndrome or a right shoulder rotator cuff tear.

We affirm the ALJ's determination that the claimant reached MMI on June 21, 2021.

We reverse the ALJ's determination that the claimant's IR is 10%, and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. M is the designated doctor in this case. On remand the ALJ is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M is still qualified and available, the ALJ is to advise Dr. M of his error in calculating 0% impairment for 94/96° of hip flexion and 0% impairment for 10/10° of hip adduction based on Table 40 of the AMA Guides. The ALJ is also to advise Dr. M of his error in calculating 4% UE impairment for 140° of shoulder flexion and 2% UE impairment for 90° of shoulder abduction, and his resulting error in calculating 10% WPI for the claimant's right shoulder.

The ALJ is to request the designated doctor to rate the entire compensable injury based on the claimant's condition as of June 21, 2021, the date of MMI, in accordance with Rule 130.1(c)(3) and considering the medical records, the certifying examination, and rating criteria in the AMA Guides. The ALJ should inform the designated doctor that the compensable injury extends to a contusion to the right shoulder, contusion to the right hip, contusion to the right thigh, and contusion to the right knee, but does not extend to right shoulder impingement syndrome or a right shoulder rotator cuff tear.

The parties are to be provided with the designated doctor's new certification and allowed an opportunity to respond. The ALJ is then to make a determination of the claimant's IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a

request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge